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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

RAMON TORRES HERNANDEZ, and  
FAMILIAS UNIDAS POR LA JUSTICIA,  
AFL-CIO, a labor organization;

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF  
LABOR and EUGENE SCALIA, in his  
official capacity as United States Secretary  
of Labor,

Defendants.

No. 1:20-CV-03241-SMJ

FIRST AMENDED  
COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF

**I. PRELIMINARY STATEMENT**

1. For decades, the prevailing practice in Washington State's tree fruit industry has been to pay piece-rate wages to farmworkers who harvest our state's cherry, pear, and apple crops. Piece-rate wages benefit agricultural employers

1 because they reward farmworkers who work quickly with wages well above  
2 minimum wage, and thus, ensure that highly perishable crops are harvested on-  
3 time to maximize grower profits.

4           2. By picking as many lugs or bins of fruit in a day as their bodies will  
5 tolerate, the average farmworker earns \$18 an hour on piece rate harvest wages  
6 while highly skilled farmworkers can earn wages well in excess of \$20 per hour.  
7 Impoverished farmworker families rely on peak piece-rate harvest wages to pay  
8 rent and buy food when seasonal work disappears during the winter and early  
9 spring.  
10

11           3. For decades, Washington's piece-rate wage system has operated in a  
12 labor market in which growers had to set piece-rates based on principles of supply  
13 and demand. Farmworkers either accepted the offered wages and began work or  
14 negotiated for increased wages. If an agreement could not be reached, farmworkers  
15 had the freedom to pursue a better deal at the next orchard down the road.  
16

17           4. The recent rise in the tree-fruit industry's use of the federal H-2A  
18 program to recruit thousands of foreign workers and their efforts to influence state  
19 wage surveys, now threaten to undermine the decades-old prevailing practice of  
20 paying higher piece-rate wages unless governmental agencies fulfill their statutory  
21 mandate to protect the wages and working conditions of U.S. farmworkers.  
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1           5.       Agricultural employers using the H-2A system realize they do not  
2 need piece-rate wages to incentivize foreign H-2A workers to accept their jobs or  
3 to meet production demands because those vulnerable workers are tied to single  
4 employer through their work visas and they have no ability to seek better wages or  
5 working conditions at a neighboring orchard. Accordingly, H-2A employers can  
6 attempt to reduce their labor costs by pegging harvest wages to lower hourly  
7 minimum wages. This violates the statutory mandate of the H-2A program which  
8 prohibits practices that adversely affect the wages and working conditions of U.S.  
9 farmworkers.  
10

11           6.       This case challenges USDOL's role in arbitrarily interjecting the  
12 "hourly wage guarantee" concept into Washington's prevailing wage surveys,  
13 which mirrors changes advocated by the agricultural industry, resulting in the  
14 elimination of higher piece-rate wages for the 2021 cherry, pear and apple  
15 harvests, replacing them with the drastically lower minimum wage.<sup>1</sup> In addition,  
16 the case challenges the arbitrary failure to use worker interviews to verify the data  
17 supplied by employers and the arbitrary imposition of a "15 percent sample size"  
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21  
22           <sup>1</sup> Washington's current minimum wage is \$13.50 and will increase to \$13.69  
23 on January 1, 2021.

1 threshold which have also contributed to the elimination of higher piece-rate wages  
2 in the same harvests.

3 7. Ramon Torres Hernandez and Familias Unidas por la Justicia, AFL-  
4 CIO (FUJ) seek immediate declaratory and injunctive relief to prevent this  
5 arbitrary agency action from drastically slashing the wages of Washington  
6 farmworkers and to preserve the status quo until a prevailing wage survey that  
7 complies with federal law can be completed.  
8

## 9 II. JURISDICTION AND VENUE

10 8. This Court has jurisdiction over this action pursuant to  
11 28 U.S.C. § 1331 (federal question) and §2201(a) (declaratory relief). Jurisdiction  
12 is also proper under the judicial review provision of the Administrative Procedure  
13 Act, 5 U.S.C. § 702.  
14

15 9. Declaratory and injunctive relief is sought consistent with  
16 5 U.S.C. §§ 705 and 706 and as authorized in 28 U.S.C. §§ 2201 and 2202.

17 10. The proper venue for this action is in the Eastern District of  
18 Washington pursuant to 28 U.S.C. § 1391(e)(1) because Defendants are an agency  
19 of the United States and an officer acting in his official capacity, no real property is  
20 involved in this action, and Plaintiff Ramon Torres Hernandez resides in the  
21 District.  
22  
23

**III. PARTIES**

11. Plaintiff Ramon Torres Hernandez (“Plaintiff Torres”) resides in Yakima County, Washington. Plaintiff Torres is a U.S. worker within the meaning of 20 C.F.R. § 655.103(b) who harvested cherries, pears, and apples in 2020, and intends to seek agricultural employment, including harvesting tree fruit in the Yakima Valley in 2021 and beyond. Plaintiff Torres is a member of Familias Unidas por la Justicia.

12. Plaintiff Familias Unidas por la Justicia (FUJ) is a farmworker labor union with approximately 900 members statewide and is affiliated with the Washington State Labor Council, AFL-CIO. FUJ’s members, many of whom have families with small children, earn annual wages that put them at or below federal poverty guidelines. USDOL’s failure to set prevailing wages as required by federal law will result in substantial decreases to FUJ members’ already meager wages. FUJ brings this action on behalf of its members and farmworkers who rely on higher piece-rate wages to support themselves and their families.

13. Defendant Eugene Scalia is the Secretary of Labor and charged with the supervision and management of all decisions and actions within the United States Department of Labor (USDOL). Plaintiffs sue Secretary Scalia in his official capacity.

1           14. Defendant USDOL is an agency of the United States within the  
2 meaning of the APA. It is responsible for overseeing and approving annual wage  
3 and working conditions surveys under the H-2A program to primarily protect the  
4 working conditions of domestic farmworkers and only issuing labor certifications  
5 to import foreign workers if sufficient domestic workers are not available to fill the  
6 jobs, as set forth in the Immigration and Nationality Act (INA), 8 U.S.C. § 1188.  
7

#### 8                   **IV. STATUTORY AND REGULATORY BACKGROUND**

9           15. The H-2A program allows U.S. employers to bring foreign nationals  
10 to the United States to fill temporary agricultural jobs where the supply of U.S.  
11 workers is insufficient, if and only if, the importation of such workers does not  
12 depress the wages and working conditions of domestic farmworkers.  
13

14           16. The modern-day H-2A program traces back to 1952, when Congress  
15 passed the Immigration and Nationality Act. The 1952 program authorized the use  
16 of temporary foreign labor but did not distinguish between agricultural and non-  
17 agricultural workers. The “H-2” program was available to employers for  
18 agriculture and non-agriculture jobs until 1986, when the Immigration Reform and  
19 Control Act of 1986 (IRCA), P.L. 99-603, § 301, 100 Stat. 3359 (1986), amended  
20 the INA by establishing a separate H-2A visa classification for agricultural workers  
21 and H-2B for non-agricultural temporary foreign workers.  
22  
23

1           17. The 1986 revisions to the foreign guestworker program were  
2 motivated by Congress's desire to ameliorate the various problems experienced  
3 under the Bracero program, the most significant of which was the "inadequacy of  
4 ... protections for farmworkers." H.R. Rep. 99-682, at 80 (1986); *see Labor*  
5 *Certification Process for the Temporary Employment of Aliens in Agriculture and*  
6 *Logging in the United States*, 52 Fed. Reg. 20,496 (June 1, 1987). The protections  
7 afforded to U.S. and foreign guest workers under the H-2A program are thus  
8 informed by, and should be considered in the context of, the problems with the  
9 Bracero program.  
10

11           18. The Bracero program was intended to increase the number of  
12 available farmworkers in the United States during the World War II worker  
13 shortage by authorizing the entry of Mexican nationals for temporary farm work.  
14 The program existed from 1942 to 1964. *See* Adam B. Cox & Cristina M.  
15 Rodriguez, *The President and Immigration Law*, 119 Yale L.J. 458, 487-90 (Dec.  
16 2009).  
17

18           19. While the Bracero program was in effect, it "was the chief source of  
19 foreign labor in the United States." Robert C. McElroy & Earle E. Garrett, USDA  
20 Econ. Research Serv., *Termination of the Bracero Program: Some Effects on Farm*  
21 *Labor and Migrant Housing Needs*, Agric. Econ. Report No. 77 (June 17, 1965).  
22 Although the United States benefitted from this cheap source of labor, Congress  
23

1 acknowledged that “[t]he Bracero program has been likened by some to indentured  
2 slavery where employer exploitation was rampant and inhumane.” H.R. Rep. 99-  
3 682, at 83. Some of the major problems under the Bracero program included  
4 underpayment, dangerous working conditions, unhealthy living conditions, and  
5 threats of deportation by employers.  
6

7 20. Beyond the substandard working and living conditions experienced by  
8 Mexican Bracero workers, the program also caused the wages paid to U.S. workers  
9 in the agriculture and railroad sectors to decline sharply, despite the inclusion in  
10 the Bracero program of mechanisms designed to prevent adverse wage effects on  
11 U.S. workers. *See, e.g.,* Cong. Research Serv., *The Effects on U.S. Farm Workers*  
12 *of an Agricultural Guest Worker Program* 4-5 (Dec. 28, 2009),  
13 <https://www.everycrsreport.com/reports/95-712.html>.  
14

15 21. Outrage over the inhumane treatment of Bracero workers and the  
16 program’s downward pressure on wages led Congress to end the program in 1964.  
17 When enacting the modern H-2A program, Congress was well aware of the past  
18 problems in the Bracero program. *See* H.R. Rep. 99-682, at 83.  
19

20 22. As a result of Congress’s attempt to avoid replicating the problems in  
21 the H-2A program, in order for employers to secure the benefits of foreign labor  
22 under the current H-2A program, they must complete a multi-step process.  
23



1           23. Prior to filing a petition with U.S. Citizenship and Immigration  
2 Services (USCIS), a division of the Department of Homeland Security, the  
3 employer must obtain a temporary labor certification from USDOL's Office of  
4 Foreign Labor Certification (OFLC) that "there are not sufficient workers who are  
5 able, willing, and qualified, and who will be available at the time and place needed,  
6 to perform the labor or services involved in the petition," and that **"the  
7 employment of [foreign] labor . . . will not adversely affect the wages and  
8 working conditions of workers in the United States similarly employed."**  
9  
10 8 U.S.C. § 1188(a)(1) (emphasis added).

11           24. Employer use of the H-2A program has risen in recent years. In  
12 Fiscal Year 2020, USDOL certified 275,430 positions to be potentially filled by  
13 H-2A workers. Declaration of Arasele Bueno (Bueno Decl.), Ex. 22. The vast  
14 majority of these certifications were for crop workers (88.1% of the certifications),  
15 agricultural equipment operators (5.6%), or ranch or aquaculture workers (4.0%).  
16 *Id.* In Fiscal Year 2020, USDOL certified 26,832 positions in Washington State,  
17 making it the third highest user of H-2A workers in the nation. *Id.*

18           25. The USDOL has promulgated regulations that govern the H-2A labor  
19 certification process. 20 C.F.R. Ch. V, Pt. 655, Subpt. B. These regulations contain  
20 numerous specific requirements for employers seeking to hire workers through the  
21 H-2A program.  
22  
23

1           26. To fulfill its duty to prevent an adverse effect on the wages of  
 2 domestic farmworkers, USDOL regulations require that employers pay a wage that  
 3 is the highest of the AEWR,<sup>2</sup> the prevailing hourly wage or piece rate, the agreed-  
 4 upon collective bargaining wage, or the Federal or State minimum wage.  
 5  
 6 20 C.F.R. § 655.120(a); *see also* 20 C.F.R. § 655.122(l).

7           27. Additional regulations promulgated under the Wagner-Peyser Act,<sup>3</sup>  
 8 29 U.S.C. § 49 *et seq.*, require the State Workforce Agency (SWA) to ensure for

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9  
 10           <sup>2</sup> The Adverse Effect Wage Rate (AEWR) is defined as:

11           the minimum wage rate that the Administrator of the Office of  
 12 Foreign Labor Certification (OFLC) has determined must be offered  
 13 and paid to every H-2A worker employed under the DOL-approved  
 14 Application for Temporary Employment Certification in a particular  
 15 occupation and/or area, as well as to U.S. workers hired by employers  
 into corresponding employment during the H-2A recruitment period,  
 to ensure that the wages of similarly employed U.S. workers will not  
 be adversely affected.

16 29 C.F.R. § 502.10. The AEWR is often referred to as the minimum hourly wage  
 17 for the H-2A program.

18           <sup>3</sup> The Wagner-Peyser Act, passed by Congress during the Great Depression,  
 19 created a public employment system aimed at improving the employment  
 20 prospects and lives of farmworkers in the United States. *See Alfred L. Snapp &*  
 21 *Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 594-96 (1982). The system  
 22 was intended to protect against wage depression for local farmworkers through the  
 23

1 all agricultural job orders, H-2A and non-H-2A, that “wages . . . offered are not  
2 less than the prevailing wages . . . among similarly employed farmworkers in the  
3 area of intended employment or the applicable Federal or State minimum wage,  
4 whichever is higher.” 20 C.F.R. § 501(c)(2)(i).

5  
6 28. The SWA in Washington State is the Employment Security  
7 Department (ESD).

8 29. ESD, as the SWA, is required to conduct prevailing wage surveys  
9 using the standards set forth by USDOL in Handbook 385. *See* 84 Fed. Reg.  
10 36168, 36184 (Jul. 26, 2019). The Handbook pre-dates the creation of the H-2A  
11 program and has not been updated since 1981. *Id.* at 36185. The prevailing wage is  
12 intended to provide an additional safeguard against wage depression in local areas  
13 through the importation of outside labor. 85 Fed. Reg. 70445, 70450 (Nov. 5,  
14 2020).

15  
16  
17 recruitment of more desperate workers willing to accept lower wages. *See id.* The  
18 current regulatory structure is the result of litigation challenging the abject failure  
19 of state job service agencies to protect the wages and working conditions of  
20 domestic farmworkers. *See NAACP, W. Region v. Brennan*, 360 F. Supp. 1006,  
21 1014 (D.D.C. 1973) (commonly referred to as the Judge Richey decision); 45 Fed.  
22 Reg. 39454 (Jun. 10, 1980).  
23

1           30.     The first sentence in Handbook 385 states the purpose of prevailing  
2 wage surveys: “Accurate farm wage data are essential to the effective operation of  
3 the Public Employment Service in serving farm employers and farm workers and  
4 in implementing the Secretary’s regulations on the intra/interstate recruitment of  
5 farmworkers. (20 C.F.R. § 653.501)”. Bueno Decl., Ex. 2 at 102 [I-111].  
6

7           31.     Handbook 385 also provides: “Data supplied by employers **must** be  
8 verified through worker interviews.” *Id.* at 108 [I-116] (emphasis added).  
9

## 10                               **V.     STATEMENT OF FACTS**

### 11                               **A.     Prevailing Piece-Rates Exceeding Statutory Minimums Are Well 12                               Established in Washington State**

13           32.     From 2006-2018, the wage survey process in Washington State  
14 determined, consistent with the agricultural industry’s decades-old practice, that  
15 piece-rate wages were the prevailing wages for the harvest of apples, cherries and  
16 pears. *See* U.S. Dep’t of Labor, Agricultural Online Wage Library,  
17 <https://www.foreignlaborcert.doleta.gov/reader-archive.cfm?abbr=WA>.

18           33.     Those findings were also consistent with what the agricultural  
19 industry touted as a wage system that benefitted both growers and farmworkers.

20           34.     In January 2015, when the issue of whether farmworkers being paid  
21 the piece rate were entitled to paid rest breaks was before the Washington Supreme  
22 Court, three agricultural industry entities, including the Washington Farm Labor  
23

1 Association (“WAFLA”),<sup>4</sup> filed an amicus brief asserting that piece rates are the  
2 common method of payment for hand harvesting crops. Bueno Decl., Ex. 3 at 152.

3 35. More specifically, the agricultural industry asserted that “Washington  
4 is number one in the harvest of: apples, sweet cherries and pears, all of which are  
5 traditionally handpicked at piece rate wages.” *Id.* at 154.

6 36. Moreover, the agricultural industry argued that skilled piece-rate  
7 workers often make more than \$20 an hour under this system. *Id.*

8 37. The agricultural industry further argued that both farmers and  
9 farmworkers benefit under a piece-rate system of pay. *Id.* at 152-53.

10 38. The agricultural industry argued that with the advent of the  
11 Washington minimum wage, piece rate compensation was tethered to an “hourly  
12 minimum wage guarantee.” *Id.* at 152  
13  
14  
15  
16

17 <sup>4</sup> At this time, WAFLA asserted it was an association comprising hundreds  
18 of agricultural employers in Washington State and that its members included  
19 companies that employ hundreds to thousands of workers on a piece rate basis. It  
20 further asserted that it filed approximately 80 percent of the H-2A applications in  
21 Washington and was the second largest employer of H-2A foreign workers in the  
22 nation.  
23

1           39. The Washington State minimum wage and the AEWR, for growers  
2 using the H-2A program, were the *only* hourly wage guarantees referenced as  
3 being used in connection with the piece-rate system. *See id.* at 152-56.

4           40. In July 2015, the Washington Supreme Court held that farmworkers  
5 being paid the piece rate were entitled to be paid for rest periods at their regular  
6 rate of pay or the minimum wage, whichever was greater. *Lopez Demetrio v.*  
7 *Sakuma Bros. Farms, Inc.*, 183 Wn.2d 649, 663, 355 P.3d 258, 266 (2015).

8           41. In response to that decision, tree fruit growers sought relief from  
9 liability for back wages owed for failure to pay farmworkers for their rest breaks  
10 from the Washington State Legislature.  
11

12           42. During a legislative hearing on the bill in February 2017, the  
13 agricultural industry presented a video in support of the piece-rate system  
14 including worker testimony that the piece-rate system gives them a chance to make  
15 more money, estimating workers earn \$250 to \$300 per day during the cherry  
16 harvest.<sup>5</sup>  
17  
18  
19

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20           <sup>5</sup> Testimony available at: [https://www.tvw.org/watch/?clientID=9375922947](https://www.tvw.org/watch/?clientID=9375922947&eventID=2017021224&eventID=2017021224&startStreamAt=2068&stopStreamAt=2293&autoStartStream=true)  
21 [https://www.tvw.org/watch/?clientID=9375922947](https://www.tvw.org/watch/?clientID=9375922947&eventID=2017021224&eventID=2017021224&startStreamAt=2068&stopStreamAt=2293&autoStartStream=true)  
22 [https://www.tvw.org/watch/?clientID=9375922947](https://www.tvw.org/watch/?clientID=9375922947&eventID=2017021224&eventID=2017021224&startStreamAt=2068&stopStreamAt=2293&autoStartStream=true)  
23 [https://www.tvw.org/watch/?clientID=9375922947](https://www.tvw.org/watch/?clientID=9375922947&eventID=2017021224&eventID=2017021224&startStreamAt=2068&stopStreamAt=2293&autoStartStream=true) (starting at approximately 34:00).

1           43. During that same hearing West Mathison testified as the President of  
2 Stemilt Growers, the largest grower of apples and pears in the United States, and  
3 on behalf of the industry and 80 other growers who bring their fruit to Stemilt's  
4 fruit packing warehouses. Mr. Mathison testified that the average piece-rate pay  
5 was approximately \$18.00 per hour.<sup>6</sup>

6  
7           44. Mr. Mathison further testified that piece-rate wages allow Stemilt to  
8 "fairly compensate [farmworkers] at rates higher than minimum wage and with  
9 better productivity to the company."

10           45. Wage data obtained from Stemilt affirms the agricultural industry's  
11 representations to the Washington Supreme Court: domestic piece-rate workers  
12 earned on average \$20.00 per hour picking cherries in 2016 and \$24.10 per hour in  
13 2017. Bueno Decl., Ex. 3 at 143-44 ¶ 5; *see also* Declaration of Rachael  
14 Pashkowski (Pashkowski Decl.) ¶ 14 (calculating average earnings for domestic  
15 and foreign H-2A workers).

16  
17           46. An East Wenatchee grower recently reported that his 2019 cherry  
18 pickers averaged \$35 per hour when their piece rate is converted to an hourly rate.  
19 Bueno Decl., Ex. 7.

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<sup>6</sup> *Id.* (starting at approximately 100:52).

1           47. Plaintiff Torres can make more than \$30 per hour when picking  
2 cherries by the piece rate, harvesting five bins in about eight hours, depending on  
3 conditions and the piece-rate, consistent with worker testimony in the legislative  
4 process. Declaration of Ramon Torres Hernandez (Torres Decl.) ¶ 8.

5  
6           48. An organizer with the United Farm Workers (UFW) who submitted a  
7 declaration in connection with ESD's 2019 Wage Survey Results declared that  
8 farmworkers when being paid by the piece rate for harvesting cherries commonly  
9 earn over \$20.00 an hour. Bueno Decl., Ex. 3 at 142.

10           **B. Washington Agricultural Industry Efforts to Replace Higher**  
11           **Paying Piece Rates with the Minimum Wage**

12           49. In the fall of 2015 following the Washington Supreme Court's  
13 landmark decision in *Lopez Demetrio* in July, the piece-rate rest-break case, the  
14 agricultural industry, led by the director of WAFLA, Dan Fazio, engaged in a  
15 concerted campaign to eliminate prevailing piece-rate wage findings in connection  
16 with Washington's Agricultural Wage survey.

17  
18           50. Mr. Fazio implored growers to report on their wage survey forms that  
19 they had paid Washington State minimum wage or the AEWL for the harvesting of  
20 tree fruit, rather than reporting the piece rates actually paid. Mr. Fazio justified this  
21 false reporting on the basis that these hourly minimum wages were "guaranteed  
22 hourly" rates. See Bueno Decl., Ex. 3 at 133, 136 & 137.  
23



1           51. The WAFLA campaign orchestrated by Mr. Fazio directly  
2 contradicted the amicus brief filed by WAFLA and other agricultural industry  
3 groups just months earlier with the Washington Supreme Court. *Supra* ¶¶ 34-39;  
4 *Cf.* Bueno Decl., Ex. 3 at 134 & 153-54.

5  
6           52. After an investigation, ESD concluded that the wage survey data was  
7 tainted, with apple, pear and cherry growers improperly influenced by the WAFLA  
8 campaign. Bueno Decl., at Ex. 8 & Ex. 9 at 262-63 & 10. Had ESD not removed  
9 the tainted data many harvest activities would have been reduced to the  
10 Washington State minimum wage rather than higher prevailing piece-rate wages.

11  
12           53. In response to grower manipulation of the 2015 wage survey,  
13 farmworker advocates called upon ESD to conduct worker surveys as required by  
14 Handbook 385.

15           54. ESD had not previously collected wage data using worker surveys,  
16 but pledged to do so beginning in 2016. *See* ECF No. 6-11 at 386.

17           55. Despite the mandate to verify wage data supplied by employers  
18 through a worker survey, USDOL has failed to use the worker survey data  
19 collected by ESD to verify employer data and has informed ESD that the worker  
20 data cannot be used in reaching the prevailing wage findings. ECF No. 6-32 at 794.

21  
22           56. Following the agricultural industry interference with the 2015 wage  
23 survey, for the first time, the 2016 wage survey in Washington included the

1 “guaranteed hourly wage” concept. *See* Bueno Decl., Ex. 3 at 133. On information  
2 and belief, ESD added the question about hourly guarantees to the wage survey in  
3 response to Mr. Fazio’s advocacy and USDOL’s approval. *See id.*

4 57. USDOL ignored the fact that the “hourly guarantee” concept was  
5 meaningless given that the Washington State minimum wage and the AEWR are  
6 statutorily mandated and therefore apply to all employers, whether employers  
7 report them or not. *See id.* at 134 (explaining the hourly guarantee concept as an  
8 anachronism from a time when many farmworkers were not covered by minimum  
9 wage laws, but Puerto Rican workers had enhanced wage protections under Public  
10 Law 87); *infra* ¶ 94.

11 58. For the first time, the wage survey results included piece rate wages  
12 for cherry, apple and pear harvest that also included an hourly guarantee. *See* U.S.  
13 Dep’t of Labor, Agricultural Online Wage Library, [https://www.foreignlaborcert.](https://www.foreignlaborcert.doleta.gov/reader-archive.cfm?abbr=WA)  
14 [doleta.gov/reader-archive.cfm?abbr=WA](https://www.foreignlaborcert.doleta.gov/reader-archive.cfm?abbr=WA) (May 25, 2017 findings).

15 59. Virtually all hourly guarantees reported for fruit harvest activities  
16 were pegged to either the 2016 Washington Minimum Wage of \$9.47 per hour or  
17 the 2016 AEWR of \$12.69. *See id.*; Pashkowski Decl. ¶ 11 (historical AEWR  
18 rates).

1           60. Wages for farmworkers were not obviously impacted during the 2017  
2 harvests because both piece rates and guaranteed hourly rates were included and  
3 agricultural employers were required to offer the higher piece rate wages.

4           61. In 2018, after ESD released initial results from the 2017 wage survey,  
5 finding, as usual, that higher piece-rate pay was the prevailing practice in apple  
6 harvest, the industry objected, in part, on the grounds that ESD could not use data  
7 if it did not represent 15 percent of all workers in a given activity, and ESD  
8 reversed its initial findings. *See* Bueno Decl., Ex. 10 at 270.

9           62. After learning of ESD’s reversal, Dan Fazio, in a newsletter to all  
10 WAFLA members, crowed about the role industry lobbyists played in eliminating  
11 higher piece rate wages for farmworkers stating, “[I]n case you didn't hear . . .  
12 [ESD] removed all piece rates for apples for growers that utilize the H-2A program  
13 effective June 19[, 2018]. This is a huge win and saved the apple industry  
14 millions. Really glad we could help.” *Id.*, Ex. 12 at 278.

15           63. Realizing its mistake, ESD reversed course yet again, and attempted  
16 to restore higher prevailing piece-rate wages for the 2018 apple harvest advocating  
17 to USDOL that the arbitrary imposition of thresholds from Handbook 385 fails to  
18 consider valid statistical findings and in this case “**lead to a large decrease in the**  
19 **required wage for workers in the Washington apple harvest**” which is “**in**  
20 **direct conflict with the fundamental goal of the H-2A temporary agricultural**  
21  
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23

1 **program to ensure domestic workers are not adversely effected by the use of**  
2 **foreign labor.”** *Id.*, Ex. 11 at 273 (emphasis added).

3 64. ESD specifically advocated that USDOL use the worker survey to  
4 verify employer responses, as required by Handbook 385. *Id.*

5 65. ESD observed that Red Delicious harvesting was paid at  
6 approximately \$22.15 per hour, when converted from a piece rate, as opposed to  
7 the AEWB then in effect of \$14.12 per hour. *Id.* at 274.

8 66. ESD further urged USDOL to consider the worker survey in  
9 conjunction with employer responses where sample size thresholds were “slightly  
10 below” the 15 percent sample size threshold,<sup>7</sup> to prevent no findings of prevailing  
11 wages for a number of apple varieties in harvesting. *Id.* at 274-75. The thresholds  
12 ranged from 10.74 percent of the worker population to 13.39 percent. *Id.*

13 67. Ultimately, USDOL refused to publish any apple harvest wage data  
14 from 2017. This decision prevented the wholesale elimination of piece rate wages  
15

16  
17  
18 <sup>7</sup> USDOL has a policy of requiring that wage survey samples collected from  
19 employers meet or exceed a certain percentage of workers employed in the crop  
20 activity even though Handbook 385 provides the sample size as a “general guide”  
21 rather than a mandate. *See supra* ¶ 63; ECF No. 6-2 at 219 (sample size of 15  
22 percent of workers for crop activities with 3000 or more workers).  
23

1 for farmworkers in the 2018 apple harvest but resulted in the use of 2016 piece rate  
 2 determinations for apple harvest which deprived workers of any increase in wages  
 3 from 2017. *Id.*, Ex. 10 at 271.

4 **C. The 2019 Wage Survey Eliminates Many Prevailing Piece-Rates**  
 5 **for Harvest Activities Replacing them with the Minimum Wage**

6 68. The 2019 Washington prevailing wage survey continued the use of the  
 7 “hourly wage guarantee” concept, which has resulted in the total elimination of  
 8 higher paying piece-rates for almost all cherry, pear and apple harvest activities  
 9 and replaced them with the Washington State minimum wage. *See id.*, Ex. 13 at  
 10 287-88. USDOL’s arbitrary failure to use the worker survey to verify the data  
 11 supplied by employers and the arbitrary imposition of a threshold sample size also  
 12 contributed to the elimination of higher piece-rate wages in the same harvests.

13 69. USDOL interjected the “hourly wage guarantee” concept into the  
 14 prevailing wage finding methodology, even though it is not defined or required by  
 15 the regulations or other written guidance and contravenes the statutory mandate to  
 16 protect U.S. farmworkers wages from adverse effects. *See infra* ¶¶ 88-93 & 104-  
 17 108.

18 70. By treating piece-rates with an “hourly wage guarantee” as different  
 19 rates of payment from piece-rates without a guarantee, many piece-rate wages were  
 20 totally excluded from consideration, even though the data shows the vast majority  
 21  
 22  
 23

1 of growers reporting a wage guarantee identified a “wage guarantee” rate that was  
2 the equivalent to or lower than statutorily required minimums. There is no basis to  
3 distinguish a piece rate without an hourly guarantee, that is subject to statutorily  
4 required minimums, from a piece rate with an hourly wage guarantee at or below  
5 those same minimum-wage standards.<sup>8</sup>  
6

7 71. Farmworker advocates raised grave concerns with the prevailing wage  
8 findings with both ESD and USDOL resulting in a delay in USDOL publishing the  
9 results. *See* Bueno Decl., Exs. 3, 4, 5 & 6. That delay will not cure the irreparable  
10 harm to Washington’s farmworkers who will be deprived of any wage increase for  
11 2021 and discouraged from seeking jobs at farms that employ H-2A workers, as  
12 described below.  
13  
14  
15  
16

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17 <sup>8</sup> Farmworkers and their advocates have also called into question whether  
18 wage guarantees, other than statutorily required minimums, are actually used in  
19 Washington State; they certainly are not a common or regular practice. *See* Bueno  
20 Decl., Ex. 3 at 132 n.2 & 133; Torres Decl. ¶ 7; FUJ Decl. ¶ 14; *see also supra*  
21 ¶ 39 (the *only* hourly wage guarantees identified by the agricultural industry in  
22 2015 were statutorily required minimums).  
23

**1. 2019 Survey Results Undermine Piece-Rate Wages**

72. In June 2020, ESD released the results from the 2019 wage survey (“2019 Wage Survey Results”). *See* Bueno Decl., Ex. 13.

73. Despite having found that higher piece rates, not fixed hourly wages, were the prevailing wage in Washington’s cherry harvest in all prior wage surveys since 2006, the flawed 2019 wage survey results indicated that nearly all cherry harvesting activity for specific varieties changed from a piece rate wage structure to an hourly wage rate of \$12.00 per hour.<sup>9</sup> *Id.* at 3-4 & 8-9.

74. Based on the flawed 2019 results, the prevailing wage rate for the harvest of Dark Red, Lapin, Skeena and Yellow cherries were all drastically lowered from a piece rate wage where workers could earn over \$20 an hour, to an hourly wage rate of \$12.00 per hour. *Id.*

75. These results stand in dramatic contrast to the decades-old practice of paying the piece-rate for harvesting cherries through which farmworkers earn well in excess of the minimum wage. *See supra* ¶¶ 34-36 & ¶¶ 42-48.

76. In addition, the flawed 2019 prevailing wage data for two varieties of apples, Braeburn and Gala, and for the harvesting of Bosc pears were also similarly

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<sup>9</sup> The Washington State minimum wage in 2019 was \$12.00 per hour.

1 lowered from a piece rate wage structure to an hourly wage rate of \$12.00 per  
2 hour. Bueno Decl., Ex. 13 at 287-88.

3 77. On July 14, 2020, ESD submitted the flawed 2019 wage survey data  
4 to USDOL. *Id.*, Ex. 6 at 248.

5 78. In addition, one commodity-activity saw a decrease in the piece rate  
6 itself; blueberry harvesting was reduced from \$.75 per pound from \$.50 per pound.  
7 *Id.*, Ex. 13 at 283 & 287.<sup>10</sup>

8 79. The Form ETA-232 and the Handbook 385 require SWAs to explain  
9 increases or decreases in prevailing rates from the previous year. *See* Pashkowski  
10 Decl., Ex. 9 at 156; Bueno Decl., Ex. 2 at 128 (I-143); *see also* *Zirkle Fruit Co.*,  
11 442 F. Supp. 3d at 1378-79 (analyzing whether the failure to explain an increase or  
12  
13

14  
15 <sup>10</sup> In *Zirkle Fruit Co. v. United States Dep't of Labor*, 442 F. Supp. 3d 1366,  
16 1383 (E.D. Wash. 2020), this Court upheld the \$0.75 piece rate from the 2018  
17 wage survey and ordered Zirkle to remit the wages that had been withheld from  
18 farmworkers.

19 Notably, Zirkle—purportedly the state's largest blueberry grower—  
20 declined to participate in the voluntary survey, foregoing the  
21 opportunity to dramatically increase the dataset on which ESD's  
22 findings were made and—if Zirkle in fact pays less than \$0.75/lb. to  
domestic laborers—potentially reduce the PWR.

23 *Id.* n.10.



1 decrease was arbitrary and capricious, and finding no such violation where the  
2 change was from an hourly rate to piece rate, and not a change from one piece rate  
3 to another).

4  
5 80. The Form ETA-232 submitted for blueberry harvest wages fails to  
6 include any explanation of the decrease in blueberry harvest wages from \$0.75 per  
7 pound to \$0.50 per pound. Pashkowski Decl., Ex. 9 at 151-166.<sup>11</sup>

8  
9 81. In addition, the data shows that at least three grower respondents who  
10 participate in the H-2A program (reflected by reporting an hourly guarantee the  
11 equivalent of the AEWR in 2019 of \$15.03) reported a piece rate below \$0.75 per  
12 pound, which was the required prevailing wage that year, as upheld in the *Zirkle*  
13 *Fruit* case, including rates of \$0.50 and \$0.60 per pound. *Id.* at 149. The prevailing  
14 wage ultimately identified by ESD for the blueberry harvest was the rate reported  
15 by an employer who reported paying piece-rate wages *less than* the rate required  
16 by law. *See id.* (line highlighted in green).

17  
18  
19 

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<sup>11</sup> Every Form ETA-232 submitted for the 2019 Washington prevailing wage  
20 survey has a cover page referring to Braeburn apple harvesting. This appears to be  
21 an error as the attached pages reference distinct activities, like the pages referenced  
22 here pertaining to blueberries. Pashkowski Decl., Ex. 17.

1           82. The 2019 survey, which led to the dramatic drop in harvest wages,  
2 yielded contrasting results for *non-harvest* wages, which have historically been  
3 paid at an hourly rate. For every non-harvest activity for which there is a  
4 comparator in the 2018 Agricultural Wage Survey, wages *increased* except for one  
5 that stayed the same (pear thinning). *Compare id.* at 8-9 with Ex. 14 at 6-7.  
6

7           83. Moreover, in the 2019 survey results, *every* non-harvesting  
8 commodity-activity with an hourly rate, again except for thinning pears, has an  
9 hourly rate that *exceeds* \$12.00 per hour, while *every* harvesting activity that  
10 changed from a piece rate to an hourly rate is set at the minimum wage of \$12.00  
11 per hour despite the well-established understanding that wages for harvesting  
12 activities exceed other activities like pruning and thinning. Bueno Decl., Ex. 13 at  
13 287-88; FUJ Decl. ¶ 15; *see supra* ¶¶ 32-48.  
14

15           84. In addition, in the 2019 survey results, prevailing piece-rate wages for  
16 apple and pear harvesting generally, and for specific varieties including, Fuji,  
17 Honeycrisp, Red Delicious and Bartlett pears were eliminated because USDOL  
18 refuses to accept wage results that fail to meet the 15 percent sample size  
19 threshold. *See* ECF No. 6-13 at 296-298; ECF No. 6-11 at 2-3.  
20

21           85. The responses for apple and pear harvesting and each of the varieties  
22 referenced in the preceding paragraph **exceeded** the response rate that ESD  
23 obtained in the 2017 wage survey which ESD argued should be sufficient, along

1 with the worker survey, to set prevailing wages as set forth in the table below. *See*  
 2 *supra* ¶ 66.

Variety	2017 % of Workers Represented	2019 % of Workers Represented
Fuji	11.23	13.83
Honeycrisp	12.16	13.05
Red Delicious	13.27	14.52
Apple Harvesting		14.64
Pears Harvesting		13.39
Bartlett		13.27

10  
 11 86. The 2019 worker survey confirmed that the most prevailing wage rate  
 12 by far is the piece rate, including for the three specific varieties, Fuji, Honeycrisp  
 13 and Red Delicious. ECF No. 6-32 at 3-4.

14 87. ESD stated that USDOL “does not ‘use’ worker survey results” and  
 15 therefore ESD submitted ETA 232 forms, which are used to set the prevailing  
 16 wage rates, “based solely on employer responses.” *Id.* at 3.

## 18 **2. The Arbitrary Use of the Hourly Wage Guarantee Results** 19 **in the Elimination of Higher Piece-Rate Pay**

20 88. The regulations applicable to the use of the H-2A program and the  
 21 Wagner-Peyser regulations do not include or define the terms “hourly wage  
 22 guarantee” or “earnings guarantee.”

1           89. The ETA Handbook No. 385 does not define the terms “hourly wage  
2 guarantee” or “earnings guarantee.” *See* Bueno Decl., Ex. 2 at 105 (I-113).

3           90. Similarly, the Handbook sections covering Standards for Preparation  
4 of Agricultural Wage Surveys and Collection of Wage Information, which  
5 describes how the SWA makes prevailing wage rate findings do not include these  
6 terms or concepts. *Id.* at 105-111 (I-113-I119). Specifically, the sections relating to  
7 40 percent rule, the 51 percent rule, and more than one unit of payment, do not  
8 include any reference to an “hourly wage guarantee” or “earnings guarantee.” *Id.* at  
9 108-109. These handbook provisions do not require SWAs to consider an hourly  
10 wage guarantee in making prevailing wage rate findings. *Id.*

11  
12           91. The only reference in the ETA Handbook No. 385 related to an  
13 “earnings guarantee” is found in the section which provides instructions to the  
14 SWA for the completion of the Domestic Agricultural In-Season Wage Report,  
15 ETA 232. *See id.* at 124-28 (I-135-143).

16  
17           92. That section states: “Rates with earnings guarantee represent a  
18 different method of payment from piece rates without earning guarantees and  
19 should be listed separately.” *Id.* at 126 (I-141).

20  
21           93. The term “earnings guarantee” is not defined in this section and not  
22 included in the special instructions. *Id.* at 124.

1           94. The reference is understood to be a term of art referring to historical  
2 protections afforded Puerto Rican farmworkers under Public Law 87 which  
3 entitled them to a *higher* hourly wage than other domestic farmworkers. *See* Bueno  
4 Decl., Ex. 3 at 134 & 170-225.

5           95. USDOL Employment Training Administration (ETA) is responsible  
6 for reviewing SWA wage rate findings. *Id.* at 110.

7           96. Once the prevailing wage results are finalized, USDOL-ETA  
8 publishes the wage results on its Agricultural Online Wage Library (AOWL). *See*  
9 <https://www.foreignlaborcert.doleta.gov/aowl.cfm>.  
10

11           97. The USDOL-ETA has not published any prevailing wage rates for  
12 Washington State since July 23, 2019. *Id.*

13           98. In July 2019, USDOL issued a notice of proposed rulemaking  
14 (NPRM) containing numerous changes to its regulations governing the H-2A  
15 program. 84 Fed. Reg. 36168 (Jul. 26, 2019).

16           99. In the NPRM, USDOL proposed to modernize the methodology used  
17 to establish the prevailing wage rate. 84 Fed. Reg. 36168, 36171 & 36184. The  
18 proposed changes are significant and include changes to the Handbook 385 and the  
19 Form ETA-232 used by SWAs to report prevailing wage survey results. *See*  
20  
21 Form ETA-232 used by SWAs to report prevailing wage survey results. *See*  
22 84 Fed. Reg. 36168, 36184-88.  
23

1           100. The NPRM does not address or reference an “hourly wage guarantee”  
2 or the “earnings guarantee” in the sections dealing with proposed changes to the  
3 prevailing wage rate methodology.

4           101. USDOL received over 83,000 public comments in response to the  
5 July 26, 2019 NPRM. 85 Fed. Reg. 70445. USDOL published a final rule on the  
6 methodology by which it determines the AEWR (the minimum hourly wage for H-  
7 2A jobs) effective December 21, 2020, and it intends to address all of the  
8 remaining proposals from the July 2019 NPRM, including changes to the  
9 methodology for prevailing wage rates, in a subsequent second final rule. *Id.*  
10

11           102. The November 5, 2020, final rule freezes AEWRs at the 2020 level  
12 for two-years. *Id.* at 70467. USDOL estimates the impact of this change will result  
13 in an average annual transfer from workers to employers of more than \$167  
14 million, or \$1.68 **billion** over the next decade. *Id.* at 70447. USDOL further  
15 acknowledges that in recent years, farmworker wages have increased significantly  
16 faster than inflation or wage increases in the overall U.S. economy. *Id.* at 70452.<sup>12</sup>  
17

---

18  
19           <sup>12</sup> At least one lawsuit challenging this AEWR freeze has been filed. *See*  
20 *UFW v. USDOL*, Case No. 1:20-CV-01690-DAD-JLT, 2020 WL 7646406, at \*1  
21 (E.D. Cal. Dec. 23, 2020) (plaintiffs’ motion for preliminary injunction granted).  
22  
23

1           103. Each year USDOL issues Training and Employment Guidance Letters  
2 (TEGL) which provide guidance to SWAs to conduct agricultural prevailing wage  
3 surveys. *See* Training and Employment Guidance Letter No. 14-19 (Apr. 13, 2020)  
4 available at [https://wdr.doleta.gov/directives/attach/TEGL/TEGL\\_14-19.pdf](https://wdr.doleta.gov/directives/attach/TEGL/TEGL_14-19.pdf).  
5

6           104. USDOL did not provide any guidance in the 2019 or 2020 TEGLs,  
7 governing the Washington State prevailing wage survey conducted in 2019  
8 through 2020 regarding the “hourly wage guarantee” or “earnings guarantee.”

9           105. Pursuant to the applicable TEGLs, ESD submitted annual plans to  
10 USDOL-ETA regarding the manner in which it intended to conduct the 2019  
11 agricultural prevailing wage survey. *See* Bueno Decl., Ex. 1.  
12

13           106. The annual plans require states to agree that they will carry out all  
14 activities, including conducting the prevailing wage survey, to support USDOL’s  
15 review and processing of H-2A job orders and applications consistent with the  
16 statutory and regulatory mandate that the employment of H-2A foreign workers not  
17 adversely affect the wages and working conditions of similarly employed domestic  
18 workers. *See id.* at 13, 20-21, 24, 60, 73, & 91.  
19

20           107. The annual plans also require states to contractually agree to submit  
21 all prevailing wage survey findings in accordance with instructions contained in  
22 the TEGL. *See id.* at 24, 26, 86, & 88.  
23

1           108. There are no instructions in the annual plans submitted by ESD in  
2 connection with the 2019 wage survey or in the TEGL related to the “hourly wage  
3 guarantee” or the “earnings guarantee.” *See* Bueno Decl., Ex. 1.

4           109. The arbitrariness of injecting the hourly wage guarantee concept into  
5 the prevailing wage determinations is well illustrated in the 2019 ETA-232 data for  
6 yellow cherry harvesting. *See* Pashkowski Decl. ¶ 21, Ex. 8.

8           110. By segregating employer responses based on whether the employer  
9 reported an hourly wage guarantee, piece rate responses were eliminated, and the  
10 prevailing wage was determined to be \$12 per hour - **\$18 less than what Plaintiff**  
11 **Torres normally earns on piece-rate wages during the cherry harvest.** *Id.*,  
12 Ex. 8 at 127.

14           111. Had the employer responses reporting a piece rate—with or without  
15 an hourly wage guarantee—been treated as the same, the piece rate would have  
16 been overwhelmingly<sup>13</sup> the most common method of payment and therefore the

18           <sup>13</sup> Nearly 80% of the employers participating in the survey for yellow cherry  
19 harvest wages reported paying piece-rate wages. Pashkowski Decl. ¶ 22. The  
20 prevailing nature of piece-rate pay for harvest activities was further reinforced by  
21 the recently released 2019 Worker Survey results, in which workers overwhelming  
22 reported piece-rate wages. Bueno Decl., Ex. 32 at 682.



1 prevailing wage would have been a piece-rate wage. *See id.* ¶ 22. Had the  
2 prevailing wage been set based on that piece-rate data, some yellow cherry  
3 harvesting wages would have increased by \$0.05 per pound. *Id.* ¶ 24; Bueno Decl.,  
4 Ex. 14 at 309 (2018 wage survey set harvesting of low-density yellow cherries at  
5 \$0.25 per pound).  
6

7 112. The arbitrariness of treating these responses differently is further  
8 underscored by the fact that, in the data set provided for yellow cherry harvesting,  
9 96% of the employers indicating they had an hourly guarantee reported that rate  
10 was at or *below* statutorily required minimums. Pashkowski Decl. ¶ 23. Similarly,  
11 in the ETA-232 data provided for red cherry harvest (no variety specified), 96% of  
12 the employers indicating they had an hourly guarantee reported that rate was at or  
13 below statutorily required minimums. *Id.* ¶ 20.  
14

15 113. There is no basis to distinguish between a piece-rate wage with an  
16 hourly guarantee that provides no more than statutorily required minimum wages,  
17 the state minimum wage and the AEWR (for H-2A employers) from those without  
18 an hourly wage guarantee because every grower must comply with statutory  
19 minimum wages.  
20

21 114. Moreover, because USDOL and ESD fail to define “hourly wage  
22 guarantee” or “earnings guarantee,” employers were not informed whether  
23 statutory minimums were in fact “hourly wage guarantees” or whether only hourly

1 guarantees that *exceed* these minimums constituted an hourly wage guarantee. *See*  
2 Bueno Decl., Ex. 3 at 132; Ex. 4 at 231-32.

3 115. Because “hourly wage guarantees” are not in common usage in the  
4 cherry harvest in Washington State, had employers been clearly instructed that  
5 only those guarantees that exceeded statutory minimums should have been  
6 reported, it is likely that very few would have reported an “hourly wage  
7 guarantee.” *See supra* n. 8.

9 116. On December 10, 2020, ESD informed stakeholders that it intends to  
10 continue to include the hourly guarantee concept in the survey methodology for the  
11 2020 wage survey and that process is now underway. *See* Bueno Decl., Ex. 33 at  
12 690.<sup>14</sup>

---

19 <sup>14</sup> The 2020 survey instrument perplexingly adds a question for employers  
20 reporting an hourly guarantee that is less than the state minimum wage. *Id.* The  
21 only way an hourly guarantee makes sense is if it provides a wage rate that exceeds  
22 statutorily required minimums. *See id.*, Ex. 5 at 231; *see also supra* ¶¶ 57 & 94.  
23

1                   **3. The Arbitrary Failure to Use Worker Surveys and**  
2                   **Imposition of a Threshold Sample Size Also Result in the**  
3                   **Elimination of Higher Piece-Rate Pay**

4           117. The wage finding process in Handbook 385 mandates that employer  
5 wage data “**must** be verified through worker interviews.” ECF No. 6-2 at 221 [I-  
6 116] (emphasis added).

7           118. ESD commenced conducting worker wage surveys consistent with  
8 this mandate in 2016. ECF No. 6-32 at 793; *see supra* ¶¶ 53-55.

9           119. USDOL provides funding to ESD to conduct the worker survey. *See*  
10 ECF No. 6-1 at 62-65 & 91-93 (ESD contracts with the University of Washington  
11 to conduct the employer and worker surveys at a total estimated cost of  
12 approximately \$400,000); ECF No. 6-31 at 5 (expected total cost of 2020 surveys  
13 \$698,437) & 7 (ESD must spend not more than 20% of federal grant funding on  
14 the surveys and field checks).

15           120. The University of Washington costs to conduct the worker survey  
16 were estimated at \$144,981 for 2019 and \$136,309 for 2020. ECF No. 6-31 at 5.

17           121. The vast majority of workers surveyed in the 2019 worker survey  
18 reported being paid by the piece rate, consistent with decades of practice  
19 recognized by the industry and farmworkers alike. ECF No. 6-32 at 3-4; *see supra*  
20 ¶¶ 32-37 & 42-48.  
21  
22  
23

1           122. Despite the mandate to verify wage data supplied by employers  
2 through a worker survey, USDOL advised ESD that “USDOL does not ‘use’  
3 worker survey results” resulting in ESD submitting prevailing wage findings based  
4 “solely on employer responses.” *Id.* at 3.

5  
6           123. USDOL’s failure to use the worker surveys allowed employers  
7 reporting hourly wages as the prevailing practice to go unchallenged and  
8 unverified.

9           124. USDOL moreover requires prevailing wage survey responses  
10 collected from employers to meet sample thresholds that meet or exceed a certain  
11 percentage of workers employed in the crop activity. *See supra* ¶¶ 61-67.

12  
13           125. Handbook 385 provides the sample response size as a “general guide”  
14 not a mandate. ECF No. 6-2 at 4 [I-114].

15           126. ESD previously asserted that USDOL’s insistence on these thresholds  
16 was arbitrary and, would result in a large decrease in workers’ apple harvest  
17 wages, in direct conflict with the fundamental goal of the H-2A program to ensure  
18 domestic workers are not adversely affected by the use of foreign labor. ECF No.  
19 6-11 at 2.

20  
21           127. ESD advocated that USDOL accept survey results slightly below the  
22 15 percent threshold, in combination with worker survey results, to set prevailing  
23 piece-rate wages. *Id.* at 3.

1           128. The 2019 Worker survey eliminates piece-rate wages for apple and  
2 pear harvesting generally, and for specific varieties including, Fuji, Honeycrisp,  
3 Red Delicious and Bartlett pears based on failing to meet USDOL's 15 percent  
4 sample size threshold. ECF No. 6-13 at 18-19.

5  
6           129. The responses for apple and pear harvesting and each of the varieties  
7 referenced in the preceding paragraph **exceeded** the response rate that ESD  
8 previously argued should be sufficient, in conjunction with the corroborating  
9 worker survey, to set prevailing wages. *See supra* ¶¶ 66 & 85.

10           130. For apple harvesting generally and Red Delicious harvesting the  
11 survey sample collected was barely under the 15 percent threshold at 14.64 and  
12 14.52 percent, respectively.

13  
14           131. USDOL's insistence on accepting only employer wage data reaching  
15 certain response thresholds, when such thresholds are included in Handbook 385 as  
16 a general guide, results in the disregard of statistically relevant data and rewards  
17 employers' failure to participate in the wage survey process such that the lack of  
18 sufficient data results in the elimination of higher piece-rate wages.

19  
20           **D. The USDOL-Sanctioned Hourly Guarantee Concept and**  
21           **Additional Arbitrary Actions Irreparably Harms Washington**  
22           **Farmworkers.**

23           132. As in past controversies related to the prevailing wage rate findings,  
following concerns being raised by advocates, a stalemate has now resulted, with

1 no corrections made to the 2019 wage survey (thus no current prevailing wages  
2 published) and employers defaulting to using wages from the 2018 Wage Survey  
3 in their H-2A Clearance Orders (effectively H-2A contracts) for 2021. *See supra*  
4 ¶¶ 61-67.

5  
6 133. Many of the Clearance Orders filed for 2021 to date have language  
7 that reserves the employers' right to lower wages based on rates published on the  
8 AOWL and many include apple, pear and cherry harvest wages that would be  
9 reduced when prevailing wages based on the 2019 Wage Survey are published on  
10 the AOWL. *See* Bueno Decl., Exs. 15, 17, 19, & 20.

11  
12 134. National data sources document a trend of farmworker wage increases  
13 averaging approximately 5% per year in Washington State and nationally, with the  
14 Pacific Region (Oregon and Washington) slightly higher at an average of 6% per  
15 year. Declaration of Rachael Pashkowski at ¶¶ 5-7, 9-10, & 13; Bueno Decl., Ex.  
16 21 (agricultural labor economist documents trend of farmworker wage increases  
17 that exceed the Employment Cost Index (ECI)).

18  
19 135. This Court recognized the national trend of increases in farmworker  
20 wages in another prevailing wage challenge. *Evans Fruit Co., Inc. v. United States*  
21 *Dep't of Labor*, 1:19-CV-03202-SMJ, 2019 WL 7820432, at \*5 (E.D. Wash. Oct.  
22 11, 2019) (citing statistical data from the U.S. Department of Agriculture).

1           136. ESD's prevailing wage surveys also show a general increase in piece  
2 rate wages over time. Pashkowski Decl. ¶ 12.

3           137. Similarly, the Adverse Effect Wage Rate (AEWR) set by the USDOL  
4 has historically increased on average over 5% per year, with a 2020 increase of  
5 5.3%. Pashkowski Decl. ¶ 11; *see supra* ¶ 102 & *infra* ¶ 143 (background related  
6 to USDOL freezing the AEWR for two years and related issues).

7           138. The flaws in the survey methodology, which have resulted in no  
8 prevailing wage findings for 2019 and have left employers using 2018 wage survey  
9 information while reserving the right to decrease wages in the future, discourages  
10 Washington farmworkers like Plaintiff Torres from applying for those jobs and  
11 depresses the labor market. Torres Decl. ¶ 14; FUJ Decl. ¶ 16.

12           139. Moreover, if the 2019 Wage Survey Results are not corrected and are  
13 published as submitted by ESD on the AOWL, certain piece-rate wages will be  
14 eliminated. *See supra* at ¶¶ 68 & 73-76.

15           140. The elimination of piece rates in the cherry harvest and reduction to  
16 the Washington State minimum wage would result in an approximate 30%  
17 reduction in hourly wages based on both industry and worker provided data. *See*  
18 Pashkowski Decl. ¶¶ 14 & 16; Bueno Decl., Ex. 3 at 142 (UFW reports the same  
19 approximate piece-rate earnings as those analyzed in Pashkowski declaration ¶ 14).

1           141. If paid at the Washington State minimum wage instead of a prevailing  
2 piece rate, **Plaintiff Torres would lose over \$3,400 (17%) of his annual**  
3 **earnings.** *See* Torres Decl. ¶ 8; Pashkowski Decl. ¶ 15.

4           142. Moreover, if the 2019 Wage Survey Results that eliminate piece rates  
5 are left to stand, employers will be even more likely to seek H-2A workers at new,  
6 much lower harvest wage rates. This will result in even more workers being paid  
7 below true prevailing-wage rates and will drive down the wages paid to all  
8 farmworkers, contrary to USDOL's statutory and regulatory framework. *See Zirkle*  
9 *Fruit Co. v. United States Dep't of Labor*, 1:19-CV-03180-SMJ, 2019 WL  
10 7819653, at \*2 (E.D. Wash. Nov. 7, 2019) (recognizing that lower prevailing wage  
11 rates would depress the wages of Washington workers as the basis for permitting  
12 ESD intervention in employer challenges to prevailing wage surveys); *supra* ¶¶ 34-  
13 36 & 42-48.

14           143. Because most farmworkers live at or below the poverty line, a  
15 reduction in wages, even of 5%, can mean the difference between keeping a family  
16 housed or becoming homeless, feeding a family or going hungry, and risking  
17 illness or paying for medicine, harm that cannot be undone through the payment of  
18 back wages. *See* FUJ Decl. ¶¶ 7, 16-17; Torres Decl. ¶¶ 2 & 14-15; Bueno Decl.,  
19 Ex. 30 at 562; *see also United Farm Workers v. Perdue*, No. 1:20-cv-01452-DAD-  
20 JLT, 2020 WL 6318432, at \*14 (E.D. Cal. Oct. 28, 2020) (finding failure to  
21  
22  
23



1 conduct wage survey that was likely to result in 5 percent wage cut for  
2 farmworkers constituted irreparable harm in the form of economic hardship).

## 3 **VI. CAUSES OF ACTION**

### 4 **FIRST CLAIM FOR RELIEF**

5 (Administrative Procedures Act – Without Observance of Procedure  
6 Required by Law – 5 U.S.C. § 706(2)(D))

7 144. The APA provides that courts must “hold unlawful and set aside  
8 agency action” that is “without observance of procedure required by law.”  
9 5 U.S.C. § 706(2)(D).

10 145. The APA requires agencies to publish notice of all proposed  
11 rulemaking in a manner that “give[s] interested persons an opportunity to  
12 participate in the rule making through submission of written data, views, or  
13 arguments . . . .” 5 U.S.C. § 553(c).

14 146. USDOL never published notice of the change in its prevailing wage  
15 methodology, which interjects the guaranteed wage concept into the wage finding  
16 process, including in its July 26, 2019 NPRM, thereby denying Plaintiffs and other  
17 affected parties an opportunity to present comment and evidence, in violation of  
18 5 U.S.C. § 706(2)(D).

19 147. USDOL’s prevailing wage methodology change was not an  
20 “interpretative rule[], general statement[] of policy, or rule[] of agency  
21 organization, procedure, or practice.” 5 U.S.C. § 553(b). To the contrary, it was a  
22  
23

1 substantive rule change that fundamentally altered Plaintiffs’ rights and employers’  
2 obligations under federal law.

3 148. Defendants’ violations cause ongoing harm to Plaintiffs.

4 **SECOND CLAIM FOR RELIEF**

5 (Administrative Procedure Act – Arbitrary and Capricious –  
6 5 U.S.C § 706(2)(A))

7 149. Under the APA, a court must set “aside agency action” that is  
8 “arbitrary and capricious.” 5 U.S.C. § 706(2)(A).

9 150. Under the INA, in its administration of the H-2A program, the  
10 USDOL has a statutory duty to prevent adverse effects to the wages of U.S.  
11 workers.

12 151. USDOL acknowledges that prevailing wage surveys are most useful  
13 to protect the wages of U.S. workers where employers commonly pay based on a  
14 piece rate and when State agencies know based on past experience that prevailing  
15 wages are higher than the AEW. *See* 84 Fed. Reg. 36168, 36180 (Jul. 26, 2019).

16 152. The change in USDOL’s the prevailing wage methodology, which  
17 interjects the guaranteed wage concept into the wage finding process, violates  
18 USDOL’s statutory obligation to protect the wages of U.S. farmworkers against  
19 adverse effects from the employment of H-2A foreign workers.

20 153. USDOL has failed to explain its departure from its longstanding  
21 policy which does not provide for the use of the “hourly wage guarantee” in  
22  
23

1 making prevailing wage findings. *See* Bueno Decl., Ex. 2 at 108-09 (Handbook  
2 No. 385 does not include the hourly wage guarantee concept in the prevailing wage  
3 rate finding instructions).

4         154. USDOL’s change in policy and practice is also irrational because it  
5 interjects the hourly wage guarantee concept, which is already guaranteed by law  
6 (e.g. state minimum wage or the federal AEWR), into the wage finding process  
7 without defining what the SWA or employers are being asked to report on or  
8 include, and results in higher piece-rate wages being eliminated when piece rates  
9 are, in fact, the prevailing wage in the industry.  
10

11         155. USDOL’s failure to use the worker surveys confirming the  
12 predominance of piece-rate pay is arbitrary and capricious. The Handbook No. 385  
13 provides: “Data supplied by employers **must** be verified through worker  
14 interviews.” Bueno Decl., Ex. 2 at 108 (I-116) (emphasis added). It is irrational to  
15 go through the process and expense of a worker survey, only to completely  
16 disregard the results which contravene employers’ assertions of paying an hourly  
17 rate for harvest work.  
18

19         156. USDOL’s insistence on requiring a sample size threshold of 15  
20 percent is arbitrary and capricious. The Handbook No. 385 provides that threshold  
21 as a “general guide [that] should be observed . . . .” *Id.* at 106 (I-114). By making  
22 that threshold mandatory, employers have an incentive not to participate in the  
23

1 survey process and valuable data, corroborated by worker surveys, is not  
2 considered, thereby eliminating higher prevailing piece-rate wages.

3 157. Finally, the change in the hourly wage guarantee policy and practice,  
4 the failure to use worker surveys to verify employer data, and the disregard of  
5 employer wage data below the 15 percent threshold, are arbitrary and capricious  
6 because these actions fail to protect the wages of U.S. farmworkers, the central  
7 purpose of setting prevailing wages. Despite the widely accepted understanding  
8 that Washington farmworkers earn more than minimum wages when working by  
9 the piece rate in tree fruit harvest, USDOL's actions result in the elimination of  
10 these higher wages.  
11

12 158. USDOL's actions are therefore "arbitrary and capricious" and in  
13 violation of the APA. 5 U.S.C. § 706(2)(A).  
14

15 159. Defendants' violation causes ongoing harm to Plaintiffs.

## 16 **VII. REQUEST FOR RELIEF**

17 Plaintiffs ask this Court to grant them the following relief:

18 1. Declare that Defendants failed to observe the procedure required by  
19 law when changing the prevailing wage methodology to interject the hourly wage  
20 guarantee concept into the wage finding process, in violation of  
21 5 U.S.C. § 706(2)(D);  
22  
23

1           2.     In the alternative, declare that the change in prevailing wage  
2 methodology which interjects the guaranteed hourly wage concept into the wage  
3 finding process is arbitrary, capricious, an abuse of discretion, or otherwise not in  
4 accordance with law within the meaning of 5 U.S.C. § 706(2)(A);

5  
6           3.     Declare that the failure to use the worker survey to verify the data  
7 provided by employers is arbitrary, capricious, an abuse of discretion, or otherwise  
8 not in accordance with law within the meaning of 5 U.S.C. § 706(2)(A);

9           4.     Declare that mandating a 15 percent sample size threshold for harvest  
10 activities traditionally paid by the piece rate and corroborated by worker surveys is  
11 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with  
12 law within the meaning of 5 U.S.C. § 706(2)(A);

13  
14           5.     Enjoin the Defendants from interjecting the hourly wage guarantee  
15 concept into the wage finding process, prohibiting its use for the 2020 Wage  
16 Survey, and to instruct ESD accordingly;

17           6.     Enjoin the Defendants and all its officers, employees, and agents, and  
18 anyone acting in concert with them, from accepting, certifying and posting in the  
19 electronic job registry any H-2A job order, including authorizing access to the  
20 interstate clearance system without requiring the employer to include a five percent  
21 wage increase for all piece-rate activities pursuant to 20 C.F.R §§ 655.100,  
22  
23

1 655.120, 655.143, 655.144, 655.150 and 655.161, until a prevailing wage survey  
2 that complies with federal law is completed in Washington State;

3 7. Enjoin the Defendants from permitting the H-2A system to adversely  
4 affect the wages of Washington farmworkers and order Defendants to preserve the  
5 status quo and rights of U.S. workers by providing notice to all H-2A employers in  
6 Washington State, pursuant to 20 C.F.R. § 655.120(b), that each employer must  
7 immediately pay all workers employed under H-2A job orders a five percent wage  
8 increase for all piece-rate activities and continue to pay that increase until a  
9 prevailing wage survey that complies with federal law has been completed in  
10 Washington State;  
11

12 8. In the alternative, order Defendants to preserve the status quo and  
13 rights of U.S. workers by providing notice to all employers in Washington State  
14 using H-2A contracts that have been certified or will be certified for work to be  
15 performed in 2021 that piece-rate wages may increase pending the outcome of this  
16 litigation;  
17

18 9. Award Plaintiffs their reasonable fees, costs and expenses, including  
19 attorneys' fees, pursuant to the Equal Access to Justice Act (EAJA),  
20 28 U.S.C. § 2412;  
21

22 10. Grant other further relief as just and appropriate.  
23

1 DATED this 4<sup>th</sup> day of January, 2021.

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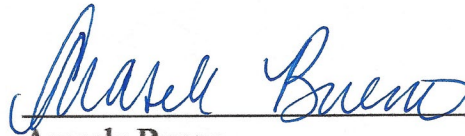
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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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And I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: None.

  
Arasele Bueno